

**BEFORE THE APPEALS BOARD  
FOR THE  
KANSAS DIVISION OF WORKERS COMPENSATION**

**DANIEL LEE SCHUHS**

Claimant

VS.

## CENTRAL MECHANICAL

Respondent

AND

**ACE FIRE UNDERWRITERS INSURANCE  
COMPANY**

Insurance Carrier

Docket No. 1,001,464

## ORDER

Respondent appeals the November 10, 2004 Award of Administrative Law Judge Nelsonna Potts Barnes. Claimant was awarded benefits for a 17 percent permanent partial impairment to the body as a whole on a functional basis for injuries suffered through December 17, 2001. The Appeals Board (Board) heard oral argument on May 10, 2005.

## APPEARANCES

Claimant appeared by his attorney, Robert R. Lee of Wichita, Kansas. Respondent and its insurance carrier appeared by their attorney, Clifford K. Stubbs of Roeland Park, Kansas.

## RECORD AND STIPULATIONS

The Board has considered the record and adopts the stipulations contained in the Award of the Administrative Law Judge.

**ISSUES**

1. Did claimant suffer accidental injury arising out of and in the course of his employment?
2. What is the nature and extent of claimant's injury?

**FINDINGS OF FACT AND CONCLUSIONS OF LAW**

Having reviewed the entire evidentiary file contained herein, the Board finds the Award of the Administrative Law Judge should be affirmed.

Claimant alleges accidental injury while he was employed for respondent as a commercial plumber. Claimant testified his work activities required that he travel to various locations, hanging pipe, installing vacuuming lines, purging lines and assembling piping. He also ran fuel lines and natural gas lines. Claimant's work required that he carry nitrogen bottles which could weigh 100 pounds or more.<sup>1</sup> He testified he carried these on a daily basis when he was using them and when he had to load and unload them in and out of the back of a truck or van to get them refilled.

Claimant testified he began noticing problems on December 1, 2001, with pain in his neck and upper back. He noticed the pain after carrying the nitrogen bottles. However, several respondent representatives testified in this matter. Lee Ann Koehn, respondent's office manager, testified that claimant advised that he had injured his right shoulder, but did not know if he had hurt it at work or somewhere else. He did, however, indicate on December 20, 2001, that he believed he hurt his shoulder while carrying nitrogen bottles on that shoulder. Vincent L. Faber, respondent's plumbing supervisor, was advised by claimant that he was having difficulties with his right shoulder. Claimant had complained to him several weeks prior to having that conversation, advising Mr. Faber that he was attempting to get into the VA Hospital, but could not do so. So he went to a chiropractor. The chiropractic treatment apparently provided no relief. Claimant then determined that he should file a workers compensation claim for the injury. However, claimant was unable to advise Mr. Faber whether he had injured himself at work or at home. He did complain to Mr. Faber on several occasions over a period of several weeks about problems associated with his shoulder.

Claimant also talked with respondent's owner, Phillip Horner, about his difficulties. When Mr. Horner asked claimant how the injury happened, claimant advised he was not sure if he had injured it at work or at home.

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<sup>1</sup> P.H. Trans. at 9.

Claimant was referred by his attorney on two occasions to Pedro A. Murati, M.D., board certified in physical medicine and rehabilitation. The first examination was on January 28, 2002, and the second on December 15, 2003. EMG/NCT tests indicated no evidence of ulnar nerve entrapment at the elbows, but did show evidence of chronic bilateral C8 radiculopathy with mild bilateral carpal tunnel syndrome. Dr. Murati diagnosed myofascial pain syndrome and a right rotator cuff strain. He assessed claimant a 15 percent impairment to the cervical spine, finding claimant to fall into DRE Category III. He also found claimant to have suffered a 5 percent impairment to the upper back. He identified this in his report as a Cervicothoracic Category II, but at the time of his deposition corrected the report to indicate it was a Thoracolumbar Category II for a 5 percent impairment. He acknowledged claimant did not have a lumbar injury, but stated that any injury to the thoracic spine under the *AMA Guides*<sup>2</sup> falls under the thoracolumbar category, which was the reason for his rating.

Claimant was referred to Paul S. Stein, M.D., a neurological surgeon, by respondent for an examination on April 29, 2002. Dr. Stein ordered an MRI, which indicated disc protrusion on the left between the 6th and 7th vertebrae in claimant's cervical spine, with degenerative changes at multiple levels. EMG and nerve conduction tests showed irritation of the C8 nerve root. A cervical myelogram indicated degenerative changes, although it did not show a definite area of nerve root compression. During Dr. Stein's examination of claimant, claimant displayed a decrease of the right biceps reflex, discomfort at the extremes of range of motion of the neck and trace weakness of the small muscles of the right hand. There was a slight decrease of perception of pinprick in the fourth and fifth fingers of the right hand, which is consistent with either ulnar nerve or C8 nerve root irritation. He assessed claimant a 15 percent impairment to the body as a whole under the Cervicothoracic Category III of the DRE from the fourth edition of the *AMA Guides*.<sup>3</sup>

Dr. Stein was asked, during his deposition, by respondent's attorney whether he formed an opinion regarding any impairment claimant may have sustained "as related to his work with Central Mechanical."<sup>4</sup> At that time, Dr. Stein testified to the DRE Category III rating of 15 percent impairment.

Claimant then returned for the second examination with Dr. Murati on December 15, 2003. Dr. Murati was provided Dr. Stein's record to review. Dr. Murati diagnosed right rotator cuff strain and carpal tunnel syndrome, although he did not find either of those to be related to claimant's injury at work. He did ultimately determine that claimant had

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<sup>2</sup> American Medical Ass'n, *Guides to the Evaluation of Permanent Impairment* (4th ed.).

<sup>3</sup> American Medical Ass'n, *Guides to the Evaluation of Permanent Impairment* (4th ed.).

<sup>4</sup> Stein Depo. at 11.

cervical strain with signs and symptoms of right-sided radiculopathy and myofascial pain syndrome, assessing claimant a 19 percent impairment to the body as a whole as discussed above.

In workers compensation litigation, it is the claimant's burden to prove his entitlement to benefits by a preponderance of the credible evidence.<sup>5</sup> The Board notes the evidence and testimony in this matter are conflicting regarding what, if any, factors may have caused claimant's upper extremity, cervical and upper thoracic spine symptoms. However, both Dr. Murati and Dr. Stein assessed claimant permanent impairments to the body as a whole for the injuries suffered while employed at Central Mechanical. Respondent's evidence, which is contradictory to claimant's testimony, comes from several representatives, all of whom state claimant was unsure as to the cause of his physical problems. None of respondent's representatives were willing to testify that claimant had no problems, just that claimant was uncertain as to the cause. There is clear indication that the physical activities performed by claimant were of a heavy nature, involving lifting from 100 to 150 pounds, on a daily basis. The Board finds these activities, coupled with claimant's testimony and the opinions of Dr. Stein and Dr. Murati, to be sufficiently convincing to support a finding that claimant did suffer accidental injury arising out of and in the course of his employment with respondent on the dates and in the manner alleged.

The Board further finds, as both Dr. Stein and Dr. Murati assessed claimant impairments and neither was sufficiently convincing to the Board to negate the opinion of the other, there is no justification for providing greater weight to one opinion over the other. The Board, therefore, affirms the ALJ's finding that claimant suffered a 17 percent impairment to the body as a whole for the injuries suffered while employed with respondent through December 17, 2001.

### **AWARD**

**WHEREFORE**, it is the finding, decision, and order of the Appeals Board that the Award of Administrative Law Judge Nelsonna Potts Barnes dated November 10, 2004, should be, and is hereby, affirmed.

**IT IS SO ORDERED.**

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<sup>5</sup> K.S.A. 44-501 and K.S.A. 44-508(g).

Dated this \_\_\_\_ day of June 2005.

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BOARD MEMBER

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BOARD MEMBER

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BOARD MEMBER

c: Robert R. Lee, Attorney for Claimant  
Clifford K. Stubbs, Attorney for Respondent and its Insurance Carrier  
Nelsonna Potts Barnes, Administrative Law Judge  
Paula S. Greathouse, Workers Compensation Director